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IN THE

Supreme Court of the United States

TERM, 1967

NO:_____

UNITED STATES OF AMERICA, EX. REL.
HOWARD CHARLES LIPSITZ, *Petitioner,*

VERSUS

MAJOR GENERAL GINES PEREZ, COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Howard Charles Lipsitz, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on January 27, 1967, Re-hearing of which was denied on March 6, 1967.

CITATION TO OPINIONS BELOW

The Order denying a Re-hearing by the United States Court of Appeals for the Fourth Circuit is the final judgment of that court, is not reported and is set forth in the appendix hereto, *infra* p. 15. The opinion of the United States Court of Appeals for the Fourth Circuit render-

ed January 27, 1967 is not reported and is set forth in the appendix hereto, *Infra* pp. 13-15. The opinion of his Honor, Robert W. Hemphill, Judge, United States District Court for the District of South Carolina is not reported and is set forth in the appendix hereto, *infra* pp. 2-12.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered January 27, 1967, *infra* pp 13-15. Petition for re-hearing was denied by the United States Court of Appeals for the Fourth Circuit on March 6, 1967, *infra* pp. 15.

The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1254(1), petitioner having asserted below, and is asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States, and denial of due process of law.

QUESTIONS PRESENTED

1. Whether the Petitioner, Howard Charles Lipsitz was denied due process of law and equal protection of the law as secured by the Fourteenth and Fifth Amendments of the Constitution of the United States, when Petitioner, Howard Charles Lipsitz was ordered inducted into the armed services by Local Draft Board No. 37 of Paterson, New Jersey, after the said draft board had violated 32 C. F. R. 1627.5 and 1627.8 by failing to notify the Petitioner that there was a Presidential Appeal being taken in his behalf and by failing to cancel the order of induction issued prior to the Presidential appeal as required by the above numbered regulations.

2. Whether the Petitioner, Howard Charles Lipsitz was denied rights conferred upon him by law and guaranteed by the Fourteenth Amendment in that because of the violation of regulations 32 C. F. R. 1627.8, he was immobil-

ized and unable to take any steps, such as were being taken by others and which were authorized by law to place himself in a draft exempt status.

3. Whether the conflicting application of the Selective Service regulations presents a question to be resolved by this Court; the regulations issued by the Director of Selective Service under the terms of the act are the law. Certain circuits treat the regulations as guidlines only while others treat them as binding law thereby creating a conflict which can only be resolved by this court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves Section 1 of the Fourteenth Amendment and the Fifth Amendment to the Constitution of the United States.

2. This case involves the Selective Service Act, 50 App. U. S. C., Section 460 (4) Subsections (b) (1) and (c).

3. This case involves the following Selective Service Regulations:

> *"32 C. F. R. 1627.3: Appeal to President:* When a registrant has been classified by the Appeal Board and one or more members of the Appeal Board dissented from that classification the registrant, any person who claims to be a dependent of the registrant, or any person who prior to the classification appealed from, filed a written request for the current occupational deferrment of the registrant may appeal to the President within 10 days after the mailing by the local board of the Notice of Classification (SS Form No. 110) notifying the registrant of their classification by the Appeal Board."
>
> *"32 C. F. R. 1627.5 Procedure on Appeal to the President.* (a) When an appeal to the President is taken, the local board shall (1) notify the registrant that the

appeal has been taken when ever it is taken by any person other than the registrant; (2) if the registrant's file is in its possession, forward the entire file to the State Director of Selective Service; and (3) enter on the Classification Record (SSS Form No. 102) under "remarks" the date the file is forwarded or the date it receives notice that an appeal to the President has been taken. (b) When an appeal to the President is taken, the State Director of Selective Service shall check the file which is in his possession or which is forwarded to him to be sure that all procedural requirements have been properly complied with, including notice to the registrant that such an appeal has been taken, and, if he discovers any procedural defect, return the file for correction. If any information has been placed in the file which was not considered by the local board in making the classification from which the appeal to the President is taken, the State Director of Selective Service shall review such information and, if he is of the opinion that such information, if true, would justify a different classification of the registrant, return the file to the local board with instructions to reopen the registrant's classification and classify the registrant anew.

(c) When the State Director of Selective Service has complied with the provisions of paragraph (b) of this section, he shall, unless "the file is returned to the local board, forward the file to the Director of Selective Service."

"*#1627.8. Appeal to the President stays induction.* The local board shall not issue an order for a registrant to report for induction either during the period afforded to the registrant to take an appeal to the President or during the period such an appeal is pending. Any order to report for induction which has been issued during either of such periods shall be ineffective

and shall be cancelled by the local board. Whenever an appeal to the President has been taken by a person entitled to do so, any order to report for induction which has previously been issued to the registrant shall be ineffective and shall be cancelled by the local board."

STATEMENT

The Petitioner, Howard Charles Lipsitz is a citizen and resident of Patterson, New Jersey, was attending Rutgers University and upon attaining age 18, as required by law, registered under the provisions of the Selective Service Act at New Brunswick, New Jersey, on October 15, 1958.

Through the years that have followed the registration of the Petitioner, there have been numerous classifications, deferrments and appeals, all of which has created an extremely voluminous record most of which is not pertinent to the solution of the questions involved in this case.

The chronology of events which bear directly on the issues begin with the decision of Appeal Board Panel #2 of New Jersey, classifying the Appellant 1-A, notice of which was conveyed to Petitioner under date of October 20, 1966 by Local Board #37 of Paterson, New Jersey. (A37). (Note: All appendix references refer to Appellant's Appendix in the record unless otherwise noted.)

On October 22, 1965, evidently before receiving the above notice, Petitioner notified Local Board #37 that his address was 138 G. Street, S. W., Washington, D. C. and requested that all future correspondence be directed to that address. (A38)

On November 1, 1965, Petitioner was ordered to report for induction on November 19, 1965. (A 40)

On November 9, 1965, the Petitioner requested transfer to Washington, D. C. where he was living (A 41) which request was granted as a matter of routine and a new Order to Report for Induction was issued by Local Board

#3 of Washington, D. C. (A 42) setting December 9, 1965 as the date of induction.

On November 24, 1965, the National Director of Selective Service requested that Petitioner's induction be postponed. (A 43)

Under date of November 29, 1965, the Petitioner was notified that his induction had been postponed. (A 45)

This letter stated: "THIS DOES NOT CANCEL YOUR ORDER TO REPORT, BUT MERELY DELAYS THE DATE OF YOUR DELIVERY FOR INDUCTION."

Under date of December 13, 1965, Petitioner again notified Local Board #37 that he lived in Washington, D. C. and gave them his new street address. (A 47)

By letter dated December 29, 1965, National Selective Service Headquarters notified the N. J. State Director of Selective Service that a Presidential Appeal had been taken on behalf of the Petitioner and gave his then current address. (A 49)

Under date of January 5, 1966, the N. J. State Director notified Local Board #37 of the action of the National Director. (A 51)

Under date of February 25, 1966, Petitioner's records were returned from the State Board to Local Board #37. (A 53)

Under date of March 3, 1966, Petitioner received a notice of classification (SSS 110) from Local Board 37, Paterson, New Jersey, informing him that his classification was 1-A as a result of a 2 to 1 vote by the Presidential Review Board, this was the first official written notice that Petitioner had received of the appeal and its results.

Under date of March 16, 1966, Petitioner received a letter from Daniel C. Omer, Deputy Director which notified him of the action of the Presidential Appeal Board, the

first official notice that Petitioner had himself received of the appeal and its results. (A 54)

The Petitioner was again, under date of March 21, 1966, ordered to report on April 7, 1966 (A 57), which date was again postponed at Petitioner's request because of the Jewish Holidays. His induction was re-scheduled and Petitioner was inducted into the Army of the United States on May 17, 1966.

The Petitioner, Howard Charles Lipsitz filed his Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina on the 24th day of May, 1966. (A 1-9) An Order for Writ was issued by His Honor, Robert W. Hemphill, United States District Judge on May 25, 1966. (A 11-12)

The Writ (A 13) issued by Miller C. Foster, Clerk of the United States District Court, set July 25, 1966 at 10:00 A. M., at Chambers, United States Court House, Columbia, South Carolina, as the time and place that the Petitioner should be brought before the Court and inquiry made as to the reasons for his detention. (in the Army of the United States.)

After one short postponement, a hearing was duly held on July 27, 1966.

On July 21, 1966, a Return to the Petition was filed on behalf of the Respondent by Terrell L. Glenn, United States Attorney, (A 14-16).

On the basis of the Respondent's Return and the hearing of July 27, 1966, the proceedings were dismissed by Order of His Honor, Robert W. Hemphill, United States District Judge, which Order is dated November 2, 1966 and filed November 4, 1966. *Infra* pp. 2-12.

From the Order of His Honor, Robert W. Hemphill, Judge, United States District Court for the District of South Carolina, the Petitioner appealed to the United

States Court of Appeals for the Fourth Circuit presenting the following questions:

1. Do regulations issued for the governing of registrants, draftees and draft boards have the force and effect of law to be applied equally and with equal force and effect to all registrants, draftees and draft boards or are they merely guidelines to be applied at the whim or caprice of any given draft board as any given situation may indicate to the board to be desirable.

2. Did Draft Board #37 of Paterson, N. J., violate regulations having the force and effect of law in its handling of Petitioner's case.

3. If it is determined that in fact Draft Board #37 of Paterson, N. J., violated regulations having the force and effect of law and if as a result of the actions of the said draft board, the Petitioner is held to service in the Army of the United States, is the Petitioner held illegally and if so should he be discharged.

The United States Court of Appeals for the Fourth Circuit sustained the Order of His Honor, Robert W. Hemphill, Judge of the United States District Court for the District of South Carolina by an opinion dated January 27, 1967, *infra* pp. 13-15, and denied re-hearing on March 6, 1967, which order is a final judgment in this case. *Infra* pp. 15.

REASONS FOR GRANTING THE WRIT

Petitioner was denied his liberty and due process of law and equal protection of the laws when he was inducted into the Army of the United States under protest and without any regard to violations of regulations by Local Board #37 of Paterson, New Jersey, which would seem to render his induction order a nullity.

Under the provision of 32 C. F. R., 1627.5 a local draft

board is required to notify a registrant when an appeal to the President has been taken in his behalf by another.

Under the provisions of 32 C. F. R., 1627.3 a registrant can take an appeal to the President on his own behalf only in the event a member of the State appeals board dissented from the majority opinion.

In this case there was no dissent at the state level and the appeal, of necessity, had to be taken by someone other than the registrant and in fact was taken by the Director of Selective Service, General Lewis B. Hershey.

The existence of the appeal brought into operation the provisions of C. F. R. 1627.8, which requires that any order of induction issued prior to an appeal to the President shall be *cancelled.*

The order of the district court (infra. pp. 10) and the opinion of the Court below (infra. pp, 13) note that the required notice was not given nor was the order of induction cancelled; in fact as to the latter, the local board was at great pains to establish that the order was not cancelled. Instead of confining its communication to the usual prepared notice, the board wrote the registrant a letter (Appellant's App. A 45). This letter stated in unequivocal terms that: *"This does not cancel your order of induction, but merely delays the date of your delivery for induction."*

Both the district court and the circuit court of appeals equated this case with the case of *Martin v. The United States,* 190 Fed. 2d. 775, drawing from the evidence the conclusion that the Petitioner had actual knowledge of the existence of the Presidential Appeal.

In the *Martin* case the registrant was present at the meeting of the draft board at the time a decision was reached and was notified at the time by the chairman of the board, in person.

Actual notice in this case is inferred from a statement of the registrant that he and a secretary in Senator Case's

office speculated that an appeal might have been taken to the President since that was what had been requested. It is submitted that speculation by uninformed people does not substitute for actual notice.

In order to draw a conclusion of actual knowledge, it was necessary to lift even that statement out of context. The full testimony on the subject is as follows: (A. 73 and 74)

> "Now, during this time, after this, for about two months almost every day I called Senator Case's office and asked if they had heard anything on my case. The secretary I talked with didn't have any information at all from National. She speculated—this is speculation—that they might have put the file in a corner somewhere, maybe they didn't want to bother with it, maybe it's too hot to handle. She didn't know why. She said, "Let's leave them alone to decide their own.' (interrupted by court)"

The letter to Local Board #37 to which the court below referred (infra. p. 14) was written March 3, 1966 after the registrant had received formal notice. The letter to the President dated March 3, 1966 to which the opinion refers, infra. p. 15 was likewise written after formal notice had been received.

The period about which the Petitioner complains is from November 29, 1965 to about March 1, 1966 and the actual uncontradicted testimony in the evidence is as follows: (75 and 76)

> "THE WITNESS: On March the 3rd, as I said I received a Form SSS-110 which is a notification of classification by one of the various agencies of Selective Service appeal board, and this was from the Presidential Board and it was effective on March 1st. And it said by appeal of the President my classification was 1-A. And this is when I realized officially that I did have an appeal before Senator Case called me and

told me that it was granted not in my favor unanimously, which turned out to be not true either. The case was decided on a two to one vote in order to have me maintained in a 1-A classification.

Subsequent to that I received the second induction notice by my local board and then was inducted.

Q. Did you ever receive a notice from your draft board or from National Selective Service Headquarters that a Presidential Appeal had been taken in your behalf?

A. I received a letter from Daniel Omer, which was in reply to a letter that I sent. And this was on, I think it was March 16th, stating—

Q. What year?

A. Pardon me, sir?

Q. What year?

A. March 16, 1966, stating that General Lewis B. Hershey took a Presidential Appeal on December 14th. This is the only official notification that I had other than the SSS Form. 110. This, of course, confirmed that. But that's the only notification that I did receive of the Presidential Appeal.

Q. December the 14th, the time that General Hershey took the Presidential Appeal, until March the 3rd, I believe you said—March 16, 1966; did you have any notice of any cancellation of your notice or of your order of induction?

A. No, not even 'til that date. I never received notice of cancellation of my—of the first induction order, never received any of it at all. I did, when I went before my local boards, look at my records and I did see letters from General Hershey and from the National —from the State Director saying the appeal was taken but that's the only notification that I did have that

the appeal was taken as I stated. No cancellation notice though at all."

Attention is invited to the words where the Petitioner states that he went before his local board and saw evidence of the Presidential Appeal in his records and to which the court below referred in its opinion, without, however, noticing that the event occurred on the 1st of April of 1966 as is shown by letter of the Petitioner to Local Board #37 dated April 5, 1966 (Appellee's App. 11) referred to by the court.

It is clear that the court below has confused the facts and has drawn unwarranted conclusions from portions of the evidence taken out of context and that the true facts are that the Petitioner had no notice, either actual or formal, of the existence of a Presidential Appeal, that the Petitioner's induction order was never cancelled and that Local Board #37 was in clear violation of the regulations herein quoted, and that as a result the Petitioner was illegally ordered inducted and in violation of the guarantees of the 5th and 14th Amendments to the Constitution of the United States is wrongfully held to service in the Army of the United States, and deprived of his liberty.

Regardless of notice, the court below has totally overlooked the requirement of 1627.8 that the order for induction be cancelled; and the fact that the local board went to great lengths to avoid complying with this very portion of the regulations.

Since his order of induction was not cancelled the registrant was totally and illegally immobilized.

Regardless of what judges might think as to his intentions with respect to joining a reserve unit; with his induction order uncancelled he could not if he would. He was legally barred from such a course as long as the order existed; and it is beyond the power of any court to hold that the individual was not prejudiced when he was prevented

by superior authority from taking an action which he had a legal right to take. When the Petitioner was denied his legal rights he was prejudiced, whether the court believed he would exercise his rights or not exercise his rights is beside the point and totally irrelevant. He had a constitutional right to the opportunity to exercise them and was denied due process when that opportunity was taken away from him.

This attitude was taken by this Court in *Simmons v. U. S.*, 348 U. S. 397, 99 L. Ed. 459.

The court referring to the failure of the Department of Justice to furnish the registrant with a resume of a report in his case, used the following language:

> "Petitioner has been deprived of a fair hearing required by the Act, a fundamental safeguard and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of deprivation."

Writ of Certiorari should be granted in this case on the same grounds as existed in the case of *Commissioner v. Bilder*, 369 U. S. 499. This case presents, as did the Bilder case, a need for uniform rule on the point in issue.

The court below acknowledges that the regulations required that the registrant be notified and that his induction order be cancelled in the event that a Presidential Appeal is taken by someone other than the registrant, but goes on to state, "The law is settled that procedural irregularities in the administration of the Universal Military Training and Service Act, 50 U.S.C.A. App. SS 451 et. seq. which do not result in prejudice, will not support a claim for relief."

It is submitted that in this case the violation of the regulations by the local board was more than a mere procedural irregularity and that the violation did result in prejudice to the Petitioner; and that furthermore, the court is mistaken in its belief that the law is well settled in this respect.

The court cites the following cases in support of that position: *United States v. Lawson*, 337 F. 2d 800 (3 Cir. 1964); *Pate v. United States*, 243 F. 2d 99, 104 (5 Cir. 1957); *United States v. Mekolichick*, 234 F. 2d 71 (3 Cir. 1956); *Martin v. United States*, 190 F. 2d 775 (4 Cir. 1951); *United States v. Deahl*, 151 F. 2d 413 (8 Cir. 1945).

The *Martin* case is probably not supportive of the court's position since Martin was personally present at the board meeting which rendered a decision in his case; however, the remaining cases cited would seem to support the court's position although they concern themselves only with such irregularities as: sign with a rubber stamp or failing to post a list of advisors, with the exception of the *Deahl* case from the Eighth Circuit which covers the question of notice.

There are, however, other cases which are clearly in conflict: *The United States v. Fry*, 203 F. 2d 638 (2d Circuit); *United States v. Hufford*, 103 F. Supp. 859 (U. S. District Court, M. D. Penn.); *United States v. Styles*, 169 F. 2d 455, (3rd Cir. 1948); and *The United States v. Zieber*, 161 F. 2d 90 (3rd Circuit); *U. S. ex rel. Berman v. Craig*, 207 Fed. 2d 888, (3rd Circuit); *Bejalis v. U. S.*, *Walker v. U. S.*, 206 Fed. 2d 354 (6th Circuit); *Tung v. U. S.* 142 Fed. 2d 919 (1st Circuit).

The case among those cited above most clearly adverse to the decision in the present case is *United States v. Styles*, 169 Fed. 2d. 455, which was decided by the United States Court of Appeals for the Third Circuit.

This case has been followed by others and no doubt the decision will continue to be followed in some areas as will the decision of the Fourth Circuit in this case, all depending upon the personal predeliction of the judge or judges sitting at the time. Under these conditions it can hardly be said that the law is well settled.

If there is confusion between the several courts as to the principles involved, the confusion must be still greater

among the more than four thousand draft boards in the United States.

The regulations were drafted and promulgated for the governance of the draft boards in their relations with registrants considered for induction. It would seem to be unreasonable and not in keeping with the intent of the law to allow each of more than four thousand draft boards to place its own interpretation on the regulations, and to violate any it seems fit to violate and then place the burden of proving prejudice or injury on the registrant, very few of whom would be in a position to litigate the matter.

In this connection, reference is made to *U. S. v. Greene*, 220 Fed. 2d 793, where the court said:

> "Selective Service System means just that. It is the sifting and testing process by which individual eligibility, exemption and deferment are determined with Congressional blueprints and enumciated Legislative policy. While classification is the democratic method for obtaining military manpower it is not an adversary proceeding in which the slightest misstep mechanically penalizes registrants."

* * * *

"In these times men everywhere closely watch how this Nation administers and follows announced principles. The validity of tolerance lies in substance and results, not in mere lip service."

It may well be that decisions such as this permitting the uneven and capricious application of the draft laws is one of the reasons for the nationwide dissatisfaction with the draft laws as they now exist.

The theory underlying the decision in this case either has or certainly will result in each draft board operating under its own draft laws.

It is submitted that this was not the legislative intent; that the decision in the *Styles* case is based upon the correct

interpretation of the law and that this Petitioner has been deprived of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States by the court's erroneous interpretation of the facts and theory on which these rights rest.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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Columbia, South Carolina,
Attorney for Petitioner.

APPENDIX